92-534

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

WALTER C. LUNDBERG, Individually and as Personal Representative of the estate of Frances J. Lundberg, Deceased, Petitioner

v.

STATE OF OREGON, by and through its Department of Transportation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTION PRESENTED

This is an eminent domain case involving the taking of a 10 foot strip from vacant commercial land for street widening. Prior to the appropriation, there was an ordinance that would have required dedication of the strip upon development of the parcel.

Does the takings clause of the Fifth Amendment prohibit the introduction of expert testimony that the strip has no value because at the time of some undetermined future development the owner will be required to dedicate the strip as a condition to obtaining the necessary permits?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

WALTER C. LUNDBERG, Individually and as Personal Representative of the estate of Frances J. Lundberg, Deceased, Petitioner

v.

STATE OF OREGON, by and through its Department of Transportation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner, Walter Lundberg (Individually and as Personal Representative of the Estate of Frances J. Lundberg, Deceased), prays that a writ of certiorari issue to review the judgment of the Oregon Supreme Court entered in the above-entitled proceeding on May 21, 1992.

OPINIONS BELOW

The opinion of the Oregon Supreme Court is reported at 312 Or 568, 825 P2d 641 (1992) and is reprinted in the appendix hereto. (App. 1).

The opinion of the Oregon Court of Appeals is reported at 100 Or App. 601, 78 P2d 456 (1990) and is reprinted in the appendix hereto. (App. 37).

JURISDICTION

The Oregon Supreme Court issued its opinion on January 30, 1992 and its Order Denying Reconsideration on April 28, 1992. The final judgment of the Supreme Court of Oregon was entered on May 21, 1992. On August 3, 1992, Justice O'Connor signed an order extending the time for filing this petition for certiorari to and including September 18, 1992.

The jurisdiction of this Court is

invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V:

> No person shall * * * be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, due process cl.:

> * * * nor shall any state deprive any person of life, liberty or property, without due process of law; * * *

STATEMENT OF THE CASE

This is an eminent domain proceeding wherein the State of Oregon appropriated a 10' by 100' strip of petitioner's vacant commercial land as part of a project to improve and widen the adjacent street. It was conceded that a taking had occurred

and that compensation must be paid. The sole issue for the jury was the amount of just compensation to be paid.

Over Petitioner's objection based, inter alia upon the U.S. Constitution, Oregon's expert was allowed to testify that due to an ordinance of the City of Portland which would require dedication of the strip upon application to the city for the permits required to develop the land, the highest and best use of the strip appropriated was to dedicate it to the city for installation of a sidewalk and that it therefore had no value. Oregon's expert conceded that, in the absence of the dedication requirement, the property appropriated would have a substantial fair market value.

The jury awarded Petitioner only a nominal amount as just compensation.

The Oregon Court of Appeals held, inter alia, that the rule that just compensation may not be based upon the governmental need for the property was not applicable because it was the State of Oregon which was condemning the property while the governmental action which reduced the value of the property was taken by a different governmental agency, the City of Portland.

The Oregon Supreme Court held that the rule that just compensation may not be based upon the governmental need for the property did not apply because Petitioner failed to prove that the city's ordinance was promulgated for the purpose of depressing property values at a time when the state was committed to condemning the property.

REASONS FOR GRANTING WRIT

The Decision Below Involves An Important Question Of Federal Constitutional Law In Conflict With Decisions Of This Court And Other State Courts Of Last Resort.

The present case has important effects far beyond the amount in controversy. Following the holding of the Oregon courts, governmental entities would be able to avoid paying more than a nominal amount as compensation for a taking for street purposes in most, if not all cases where the property is not being used for its highest and best use.

The first step in accomplishing this is to, in advance of the appropriation, require dedication as a condition of granting land use permits. When the property is subsequently condemned, it

then has no value because all reasonable buyers know that they will have to dedicate in order to receive their development permits. Even though a taking has occurred and compensation must be paid, the full fair market value of the property taken is zero or a nominal value.

Petitioner's land was vacant and no permit had been requested. Even though no use of the property was contemplated which would contribute to the need for sidewalks, the court below held that the dedication requirement was a valid regulation of Petitioner's property, because "[a]n essential nexus exists between development of property abutting public streets and sidewalk dedication." (App. 28).

In making this broad finding, the Oregon court has misinterpreted the test

set forth by this court in *Nollan v. California Coastal Com'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987). *Nollan* requires more than a simplistic one size fits all matching of the type of burdens created by development with the type of conditions imposed on development. *Nollan* requires a case by case matching of the burdens created by a specific development against he conditions imposed on that development.

Application of the *Nollan* test to this case would require that before Oregon may require dedication of Petitioner's land, it must show that the use of Petitioner's land is **substantially** related to the need to widen the adjacent street. Since Petitioner's property remains vacant and there has been no permit application, the test cannot possibly be met.

The net result of the evidentiary use of the ordinance is that Oregon has acquired the property without paying for it while the use of Petitioner's remaining property has contributed no burden whatsoever upon the street.

The holding of this court in *U.S. vs. Virginia Electric Co.*, 365 US 624, 81 S Ct 784, 5 L Ed 2d 838 (1960), is that the prospect of governmental appropriation is not a factor which may be considered in determining the value of the property appropriated. The intent of the Government is not an element to be considered. Under Oregon's nominal value theory, the prospect of governmental appropriation is the determining factor in deciding valuation.

The court below rejected Petitioner's argument based on *Virginia Electric*

because Petitioner did not established that the city's ordinance "was promulgated in order to reduce the value of the property at a time when the state was committed to condemning the property in order to widen [the street]" and that the **purpose** of the ordinance was to depress property values in contemplation of condemnation. (App. 33-34). *Virginia Electric* sets forth no test based on intent or purpose. To the contrary, the Government in *Virginia Electric* obviously did not decide to build a dam for the purpose of depressing values. Any decrease in value was merely a side effect of the Government's decision to put property to a public use.

The holding of *Virginia Electric* is that the special need which the Government has for property is not a proper factor to

use in determining just compensation in an eminent domain case. Oregon's nominal value theory in this case is based entirely on the governmental need for the property. Oregon's expert testified that the highest and best use of the property taken was to dedicate it to the City to put a sidewalk on it but that the remaining property has substantial value. The only difference between the worthless property taken and the remaining valuable property is the governmental need for the property for street purposes.

The court below's discussion of this matter as an evidentiary question glosses over the dramatic prejudicial and unconstitutional impact of expert testimony that the property taken has no value. The use of the ordinance in this manner results in a taking of private

property for public use without just compensation.

The present decision of the Supreme Court of Oregon is in conflict with the courts of at least two states which have rejected the use of the nominal value theory in an eminent domain setting. *Dade Co. v. Still*, Fla, 377 So2d 689 (1979), *County of Clark v. Alper*, 100 Nev 382, 685 P2d 943 (1984).

The only state other than Oregon of which Petitioner is aware which has accepted the nominal value theory in an eminent domain setting is California. *People ex rel. Dept. Pub. Wks. v. Investors Diversified Services, Inc.*, 262 C.A.2d 367, 68 Cal. Rptr. 663 (1968)

CONCLUSION

Petition for certiorari should be granted. At issue is an important federal

constitutional issue affecting substantial property rights on which there exists a conflict among the courts of last resort of several states. The issue should be settled in this Court.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF THE STATE OF OREGON

Filed: January 30, 1992

STATE OF OREGON,
by and through its
DEPARTMENT OF TRANSPORTATION,
Respondent on Review,
v.
Walter C. LUNDBERG,
Individually and as the Personal Representative of the Estate of Frances J. Lundberg, Deceased,
Petitioner on Review.
(CC A8801-00481; CA A50223; SC S37157)

STATE OF OREGON,
by and through its
DEPARTMENT OF TRANSPORTATION,
Respondent on Review,

v.

ATLAS CONSTRUCTION COMPANY,

Petitioner on Review.

(CC A8711-06919; CA A50779; SC S37205)

(Cases Consolidated for

Argument and Decision)

In Banc

On review from the Court of Appeals.

Argued and submitted November 7, 1990.

G. Kenneth Shiroishi, Portland, argued the cause for petitioner on review Walter C. Lundberg. With him on the petition were Dunn, Carney, Allen, Higgins & Tongue, John M. Keller, and Keller & Keller, P.C., Portland.

Paul G. Dodds, Portland, argued the cause for petitioner on review Atlas Construction Company. On the petition were James W. Hendry and Brownstein, Rask,

Sweeney, Kerr, Grim & DeSylvia, Portland.

Jas. Adams, Assistant Attorney General, Salem, argued the cause for respondent on review. With him on the response brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

UNIS, J.

The decisions of the Court of Appeals are affirmed, but on different grounds. The judgments of the circuit courts are affirmed.

UNIS, J.

In these consolidated cases, the State of Oregon, by and through its Department of Transportation (plaintiff), acquired two pieces of property, located along S.E. 82nd Avenue in Portland, in condemnation actions under its power of

eminent domain.[1] At each trial, the state offered evidence of the existence of a sidewalk dedication ordinance passed by the City of Portland (city). The evidence was offered to suggest that, because of certain limitations placed on uses of the properties by the ordinance, the

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[1]"Eminent domain is the power inherent in a sovereign state of taking or of authorizing the taking o' any property within its jurisdiction for a public use or benefit." *MacVeagh v. Multnomah County*, 126 Or 417, 431-32, 270 P 502 (1928). Condemnation is the "[p]rocess of taking private property through the power of eminent domain." Black's Law Dictionary 292 (6th ed 1990). The procedures for condemnation by the state are outlined in ORS 281.210 to 281.260.

properties were worth less than they otherwise would have been. In each case, the trial court admitted the evidence for the jury's consideration over timely objection by the owners of the properties. The issue before us is whether the trial court in each proceeding erred in its ruling. We hold that it did not err.

On August 20, 1980, the Portland City Council adopted a land use plan that sought to "create a safe and efficient transportation pattern along 82nd Avenue," "minimize conflicts between vehicular and pedestrian movement," "provide safe pedestrian circulation to community facilities," and "improve the visual appearance" along S.E. 82nd Avenue. In furtherance of those goals, the plan called for widening S.E. 82nd Avenue by

establishing an 80-foot right-of-way, which includes a 60-foot roadway (containing four travel lanes and a center lane for left turns) and 10-foot sidewalks with street trees.

On March 11, 1981, a sidewalk dedication ordinance, Portland City Code (PCC) § 17.88.010, was adopted.[2] It provides in part:

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[2]ORS 227.215(2) provides:

> "A city may plan and otherwise encourage and regulate the development of land. A city may adopt an ordinance requiring that whatever land development is undertaken in the city comply with the requirements of the ordinance and be undertaken only in compliance with the terms of a development permit."

"No single family, multiple dwelling, industrial or commercial building shall be constructed, or altered so as to increase its number of occupants, on property that does not have direct access by frontage or recorded easement with not less than 10 feet width of right-of-way to a street used for vehicular traffic. If such street or any other street adjacent to the property used for vehicular access for said property does not have a standard full width improvement, including sidewalks, the owner as a condition of obtaining a building permit, conditional use, zone change, land partition or variance, shall provide for such an improvement or a portion thereof as

designated by the City Engineer, in accordance with provisions elsewhere in this Title."

Defendants Lundberg and Atlas Construction Co. (Atlas) each own commercially-zoned property that abuts S.E. 82nd Avenue. Lundberg's property is vacant; Atlas' property contains nine rental cottages. The parties agree that the highest and best use for the properties is commercial. No zoning change is, therefore, required. Neither defendant has applied to the city for a building permit, conditional use permit, zone change, land partition, or variance.

In these condemnation actions, plaintiff sought to acquire a 10-foot strip along each defendant's property as part of plaintiff's project to improve

S.E. 82nd Avenue. That project included constructing sidewalks. The property sought to be acquired was to be used for sidewalks. After the parties in each case were unable to agree in 1987 as to the appropriate price for the acquisition, plaintiff brought these condemnation actions.

The sole issue at each trial was the just compensation to which each defendant was entitled for the property taken. Before trial, each defendant filed a motion *in limine*, seeking to prohibit plaintiff from introducing evidence and plaintiff's counsel from making statements or arguments relating to PCC § 17.88.010. Each defendant argued that PCC § 17.88.010 was (a) not relevant to any issue presented at trial, (b) unconstitutional

as applied[3] because its dedication requirement violated the takings clause of the Fifth Amendment to the United States Constitution,[4] made applicable to the

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[3]Neither defendant contends that the mere enactment of PCC § 17.88.010 effected a taking or that it is unconstitutional on its face.

[4]The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."

Defendants also relied on Article I, section 18, of the Oregon Constitution, which provides that "[p]rivate property shall not be taken for public use without just compensation." Defendants, however, do not suggest any different analysis under the Oregon Constitution than-under

states by the Fourteenth Amendment, and (c) inadmissible under *U.S. v. Virginia Electric Co.*, 365 US 624, 636, 81 S Ct 784, 5 L Ed 2d 838 (1961), which stated that "[t]he court must exclude any depreciation in value caused by the prospective taking once the Government 'was committed' to the project" (citing authorities).

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the United States Constitution. Therefore, we assume for purposes of this case, without deciding, that the analysis would be the same under the Oregon Constitution. *See State v. Mendez*, 308 Or 9, 19, 774 P2d 1082 (1989) (this court declined to consider a state constitutional claim because the party "failed to brief or argue any independent state constitutional theory").

In each proceeding, the trial court denied the motion and admitted the code provision in evidence, as well as expert testimony concerning its effect on the fair market value of each property. The trial courts also allowed plaintiff's counsel to refer to the code provision in opening statements and closing arguments. In each trial the jury did not agree with defendant's value of the condemned property and awarded defendant Lundberg $200 and defendant Atlas $2,500. The Court of Appeals affirmed each judgment. *Dept. of Trans. v. Lundberg*, 100 Or App 601, 788 P2d 456 (1990); *Dept. of Trans. v. Atlas Construction Co.*, 101 Or App 245, 789 P2d 20 (1990).

We allowed review to determine whether the trial courts erred in allowing

the juries to consider the impact of PCC § 17.88.010 on the fair market value of the condemned property. We conclude that the trial courts did not err. We affirm the decisions of the court of Appeals, but on different grounds than those stated by that court.

Defendants first contend that PCC § 17.88.010, the city's sidewalk dedication ordinance, has no relevance to the value of the condemned property because they have not applied for any land use approvals that would invoke the sidewalk dedication requirement and that, therefore, its evidentiary use by the juries concerning its impact on the fair market value of the condemned property is speculative. We disagree.

In a condemnation action, the owner

of property taken for public use by a public body is entitled to "just compensation." US Const, Amend V. Just compensation is full remuneration for loss or damage sustained by an owner of condemned property. It is the fair market value of the condemned property or the fair market value of that of which the condemnee has been deprived by reason of the acquisition of the condemnee's property. *State Highway Comm. v. Hooper*, 259 Or 555, 560, 488 P2d 421 (1971). In the case of a partial taking of property, the measure of damages is the fair market value of the property acquired plus any depreciation in the fair market value of the remaining property caused by the

taking. *Id.*[5] Fair market value is defined as the amount of money the property would bring if it were offered for sale by one who desired, but was not obliged, to sell and was purchased by one who was willing, but not obliged, to buy. *Highway Comm. v. Superbilt Mfg. Co.*, 204 Or 393, 412, 281 P2d 707 (1955) (citing *Page v. Linn County*, 135 Or 430, 437, 296 P 65 (1931)). Just compensation requires that valuation of property be based on its highest and best use.[6]

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[5]The depreciation in the fair market value to the remaining property is called "severance damages." *State Highway Comm. v. Hooper*, 259 Or 555, 560, 488 P2d 421 (1971).

[6]Valuation of property is measured as of the date the condemnation action is

> "'Highest and best use is that which, at the time of appraisal, is the most profitable likely use of a property. It may also be defined as that available use and program of future utilization which produces the highest present land value.'"

2 Damages § 22.4, at 22-4 to 22-5 (Oregon CLE 1990), quoting American Institute of-Real Estate Appraisers, *The Appraisal*

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commenced or the date the condemnor enters on and appropriates the property, whichever first occurs. *See State Highway Com. v. Stumbo*, 222 Or 62, 74-77, 352 P2d 477 (1960); *State ex rel Dept. of Trans. v. Glenn*, 288 Or 17, 23, 602 P2d 253 (1979); *Highway Com. v. Assembly of God*, 230 Or 167, 177, 368 P2d 937 (1962).

of *Real Estate* 43 (7th ed 1978). The highest and best use of property may be other than the use to which the property is currently put if it is reasonably probable that the property has actual potential for higher and better use. *State Highway Com. v. Arnold*, 218 Or 43, 57, 341 P2d 1089, *modified* and *reh den* 218 Or 81, 343 P2d 1113 (1959); *Highway Com. v. Assembly of God*, 230 Or 167, 176, 368 P2d 937 (1962). The question of the highest and best use of particular property is not a question of constitutional magnitude or of law, but is a question of fact that relates to the question of value and is to be decided by a jury. *Douglas County v. Briggs*, 286 Or 151, 157, 593 P2d 1115 (1979).

The issue, then, is whether the

sidewalk dedication ordinance is relevant to the issue of just compensation. Proffered evidence is relevant under OEC 401 if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See State v. Clowes*, 310 or 686, 692, 801 P2d 789 (1990) (rephrasing and applying Oregon Evidence Code (OEC) 401 relevancy standard). This standard is a very low threshold that evidence must cross to be considered relevant. Whether the proffered evidence satisfies the minimum threshold of relevancy required by OEC 401 is a preliminary question for the trial judge under OEC 104(1). *Id.*

In determining the fair cash market

value of the land condemned, "all considerations that might fairly be brought forward and reasonably be given substantial weight in negotiations between the owner and a prospective purchaser" should be taken into account. *Highway Comm. v. Superbilt Mfg. Co.*, supra, 204 Or at 412. Although "any evidence purporting to show the adaptability of land to a use not yet made of the property is conjectural[,] * * * the rule against speculative uses does not preclude evidence of the adaptability of land to the highest and best use." *Highway Com. v. Assembly of God, supra*, 230 Or at 176.

As previously stated, Lundberg's property is vacant; Atlas' property contains nine rental cottages. The highest and best use for each of

defendant's property is commercial. Defendants could not develop their commercially-zoned property without first satisfying the ordinance's sidewalk dedication requirement. The ordinance's sidewalk dedication provision is a matter that tends to affect the fair market value of the condemned property for its highest and best use. A reasonable seller or buyer would want to consider the ordinance in determining fair market value because it imposes a restriction on the owner's use of the condemned property, which tends to affect the property's fair market value. PCC § 17.88.010 satisfies the minimum threshold of relevancy required by OEC 401.[7]

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[7]The relevance standard in condemnation proceedings before the

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adoption of the Oregon Evidence Code was similar. *See State Highway Com. v. Bailey*, 212 Or 261, 307, 319 P2d 906 (1957) (any matter that would be considered by a prospective vendor or buyer or which tends to enhance or depreciate the value of the property is relevant in a condemnation action for the purpose of determining fair market value); *Highway Comm. v. Superbilt Mfg. Co.*, 204 Or 393, 412, 281 P2d 707 (1955) (in determining fair market value of property condemned, "all considerations that might fairly be brought forward and reasonably be given substantial weight in negotiations between the owner and a prospective purchaser" should be taken into-account); see also 5 J. Sackman,

Defendants next claim that PCC § 17.88.010 is unconstitutional as applied. Relying on *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), defendants claim that, because they have not applied for any land use approvals that make PCC § 17.88.010 applicable, there is no rational nexus between that ordinance's sidewalk dedication requirement and the *present* use

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Nichols on Eminent Domain 18-54, § 18.11 (Rev 3rd ed 1989) (generally, zoning regulations or other ordinances that place restrictions on the owner's use of the property are factors that would be considered by a prospective purchaser and, therefore, are relevant to determining the fair market value of the condemned property).

of their properties. Stated differently, defendants assert that the evidentiary use of the ordinance by the juries to determine just compensation gives a premature immediate effect to the ordinance's sidewalk dedication requirement and, therefore, under *Nollan* constitutes an unconstitutional taking. We disagree.

In *Nollan*, a coastal development land use permit to rebuild an ocean-front building was granted to prospective purchasers of a beach-front lot on the condition that they grant an easement for the public to gain access to the ocean across a portion of their property. The purchasers contended that the imposition of that condition constituted a taking of their private property without just

compensation in violation of the Fifth Amendment. The Supreme Court of the United States held that this type of condition amounts to an unconstitutional taking unless there is an "essential nexus" between the land use regulation that the permit condition is intended to implement and the permit condition. The Court described this requirement:

> "[A] permit condition that serves the same legitimate [governmental] purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. * * *
>
> "The evident constitutional propriety disappears, however,

> if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. * * * In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"

Nollan v. California Coastal Comm'n, *supra*, 483 US at 836-37 (citing authority). The Court concluded that the permit condition did not serve any of the purposes relied on to justify its imposition. The lack of nexus between the permit condition and the purpose of the

building restriction converted that purpose to "the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation[,]" *i.e.*, to an unconstitutional taking. *Id.* at 837.

As stated in the city's land use plan, some of the city's purposes for installing sidewalks along S.E. 82nd Avenue are to 'minimize conflicts between vehicular and pedestrian movement" and to "provide safe pedestrian circulation to community facilities." The ordinance first states that "[n]o single family, multiple dwelling, industrial or commercial building shall be constructed, or altered so as to increase its number of occupants" on property that does not have a sidewalk. The ordinance then provides that, if the

street adjacent to "said property does not have a standard full width improvement, including sidewalks," the property owner must dedicate the necessary property for a sidewalk as a condition for obtaining the land use permit necessary for developing the property.

When read together with the city's land use plan, it is apparent that one purpose of the ordinance is to protect the increased pedestrian traffic that may result when the owner develops his or her property "so as to increase its number of occupants." The requirement of sidewalk dedication reasonably relates to commercial development by providing pedestrian access and mitigates the negative impact of any proposed commercial use by buffering both the pedestrian and

the commercial use from the vehicle use. The city's means for achieving these objectives is to require the owner to dedicate property for a sidewalk when the owner seeks to develop the property. The ordinance substantially furthers those purposes. An essential nexus exists between development of property abutting public streets and sidewalk dedication. The sidewalk dedication requirement in PCC § 17.88.010 serves the same legitimate governmental purposes that would justify denying defendants permits to develop their commercially-zoned properties. Although the sidewalk dedication requirement results in an appropriation of land for a public use, *Security & Invest. Co. v. Oregon City*, 161 Or 421, 432, 90 P2d 467 (1939), under Nollan that

requirement would not be considered a taking if it were attached to a permit to develop property. *See Nollan v. California Coastal Comm'n, supra*, 483 US at 836. PCC § 17.88.010 is, therefore, a valid regulation of the use to which defendants' properties can be put.

The question, then, is whether, as defendants claim, the evidentiary use of the ordinance by the juries to determine just compensation gives a premature immediate effect to the ordinance's sidewalk dedication requirement and, therefore, constitutes an unconstitutional taking. The answer is "no."

We have concluded that, on application for a land use approval, the sidewalk dedication requirement would not be unconstitutional under *Nollan*. We also

have concluded that the existence of the sidewalk dedication requirement is relevant to determining just compensation for the property. The fact that defendants have not applied for any land use approvals does not, therefore, convert the evidentiary use of the ordinance by the juries to determine the fair market value of the condemned property into an unconstitutional taking. Evidentiary use in a condemnation action of a valid regulation of a condemnee's land use that is a relevant factor in determining just compensation does not constitute an unconstitutional taking.[8] Accordingly,

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[8]The evidence is that, even without the sidewalk dedication requirement, neither defendant could have developed the property taken because the city's 15-foot

PCC § 17.88.010 is not unconstitutional as applied in these condemnation actions.

Defendants' final contention is that the city adopted the sidewalk dedication ordinance in *order to depress property values* before the state undertook condemnation actions. Relying on *U.S. v. Virginia Electric Co., supra*, defendants assert that an ordinance that depresses the value of real property in contemplation of later condemnation cannot be used as evidence in a condemnation action involving that property and that, therefore, the trial courts erred in admitting the ordinance. The Court of Appeals rejected defendants' argument on the basis that "it was not the condemnor

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setback ordinance would preclude development of that property.

state's action that reduced the value of the property; it was the *city's* ordinances that had that effect." *Dept. of Trans. v. Lundberg, supra*, 100 Or App at 605. (Emphasis in original.)

Under *U.S. v. Virginia Electric Co., supra*, "[t]he court must exclude any depreciation in value caused by the prospective taking once the Government 'was committed' to the project." 365 US at 636 (citing authorities). This rule is premised on the reasoning that "[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat * * * [of the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property' when eventually condemned." *Id.* (quoting

authority).

We need not decide in this case whether we agree with the Court of Appeals' holding that the rule enunciated in *Virginia Electric* cannot apply when a *city* ordinance reduces the value of the property taken, but the *state* condemns the property. Assuming that the rule of *Virginia Electric* may apply when one governmental body acts in order to reduce the value of the property when another governmental body is committed to condemning the property, defendants have not established the necessary link. That is, defendants have not shown that PCC § 17.88.010 (the city's sidewalk dedication ordinance), evidence of which they sought to exclude, was promulgated in order to reduce the value of the property at a time

when the state was committed to condemning the property in order to widen S.E. 82nd Avenue.[9]

Defendants assert that the similarity

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[9]If the purpose for the enactment of PCC § 17.88.010 caused that ordinance to violate the rule of law announced in *U.S. v. Virginia Electric Co., supra*, the ordinance, although relevant, would nonetheless be inadmissible under OEC 402, which states:

> "All relevant evidence is admissible, *except as otherwise provided* by the Oregon Evidence Code, *by the Constitutions of the United States* and Oregon, or by Oregon statutory and decisional law. Evidence which is not relevant is not admissible." (Emphasis added.)

of the city's land use plan and the state's plan is proof that the city and state were acting together in widening S.E. 82nd Avenue and that, consequently, the sidewalk dedication ordinance was enacted to facilitate the state's S.E. 82nd Avenue project. But mere adoption of either the city's land use plan or the sidewalk dedication ordinance does nothing by itself to prove that the city adopted either the plan or the ordinance in order to reduce property values for the state's subsequent project, which involved taking property along S.E. 82nd Avenue. The ordinance itself has general applicability beyond S.E. 82nd Avenue. Even if the ordinance were adopted in order to implement the city's land use plan for S.E. 82nd Avenue, however, that plan was

based on the goals of "minimiz[ing] conflicts between vehicular and pedestrian movement" and "provid[ing] safe pedestrian circulation to community facilities." Essentially, defendants have offered nothing more than the existence of the sidewalk-dedication ordinance and the existence of the state's project to support their claims that the purpose of the ordinance was to depress property values in contemplation of the state's condemnation proceedings. Defendants also have not shown that at the time of the enactment of the ordinance the state was committed to its S.E. 82nd Avenue project.

Defendants have failed to establish that, under *U.S. v. Virginia Electric Co.*, *supra*, the ordinance was a "prospective taking once the Government 'was committed'

to the project" that would result in a taking. PCC § 17.88.010 was, therefore, properly admitted in evidence.

We hold that the trial court in each condemnation proceeding did not err in allowing evidence relating to PCC § 17.88.010 to be heard by the jury that determined the fair market value of the 10-foot roadside strip acquired by plaintiff under its power of eminent domain for the purpose of widening S.E. 82nd Avenue and putting in a sidewalk.

The decisions of the Court of Appeals are affirmed, but on different grounds. The judgments of the circuit courts are affirmed.

OPINION OF THE COURT OF APPEALS

OF THE STATE OF OREGON

STATE OF OREGON,

by and through its

DEPARTMENT OF TRANSPORTATION,

Respondent,

v.

LUNDBERG,

Appellant.

(A8801-00481; CA A50223)

Appeal from Circuit Court, Multnomah County.

Kathleen B. Nachtigal, Judge.

John M. Keller, Portland, argued the cause for appellant. With him on the briefs was Keller & Keller, P.C., Portland.

Jas. Adams, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General,

Salem.

Before Joseph, Chief Judge, and Newman and Deits, Judges.

DEITS, J.

Affirmed.

DEITS, J.

Defendant is the owner of property abutting S.E. 82nd Avenue in Portland, Oregon. Plaintiff brought this eminent domain proceeding to acquire a 10-foot by 100-foot strip of defendant's land for the widening of 82nd Avenue. The only issue at trial was the amount of compensation. The jury awarded defendant $200, and defendant appeals. We affirm.

Defendant filed a motion *in limine* seeking to prohibit plaintiff from introducing as evidence a Portland ordinance that requires, as a condition

for obtaining a building permit, conditional use permit, zone change, partition or variance for property in the area, that the landowner dedicate a 10-foot strip of land adjacent to the street as a right-of-way that must have "a standard full width improvement, including sidewalks." Portland City Code (PCC) § 17.88.010.[1] The trial court denied the

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[1]The ordinance provides in part:

"No single family, multiple dwelling, industrial or commercial building shall be constructed, or altered so as to increase its number of occupants, on property that does not have direct access by frontage or recorded easement with not less than 10 feet width of right-of-way to a street used for vehicular traffic.

motion and allowed the ordinance in evidence, as well as testimony concerning its effect on the value of the property that plaintiff seeks to acquire.

Both parties' expert witnesses testified that they would tell potential

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> If such street or any other street adjacent to the property used for vehicular access for said property does not have a standard full width improvement, including sidewalks, the owner as a condition of obtaining a building permit, conditional use, zone change, land partition or variance, shall provide for such an improvement or a portion thereof as designated by the City Engineer, in accordance with provisions elsewhere in this Title."

purchasers about the dedication requirement. Plaintiff's expert testified that a knowledgeable purchaser would conclude that the disputed property had little or no value. There was also evidence, which defendant does not challenge, that another city ordinance, PCC § 33.110.010, requires a 15-foot setback from the street and that that would include the disputed 10-foot strip. In addition, several ordinances prohibit parking on a setback. PCC §§ 14.20.010, 17.28.010, 17.28.030, 33.82.010(k), 33.82.035, 33.110.020.

Defendant contends that the city's dedication ordinance has no relevance to the value of the property, because he has not applied for any land use approvals that would make it applicable and,

therefore, its impact is speculative. However, any competent evidence tending to prove an effect on market value that would be considered by a prospective buyer is relevant to the issue of value in an eminent domain case. *State Highway Com. v. Bailey et al*, 212 or 261, 319 P2d 906 (1957); *Dept. of Trans. v. Southern Pacific Trans. Co.*, 89 Or App 344, 348, 749 P2d 1233, *rev den* 305 Or 671 (1988). There was expert testimony that the ordinance would affect the market value. Accordingly, the ordinance and testimony assessing its impact was relevant.

Defendant next argues that the ordinance is unconstitutional as an uncompensated taking of property, in violation of the Fifth and Fourteenth Amendments and Article I, section 18, of

the Oregon Constitution. We agree that, if the ordinance is unconstitutional, that could affect its admissibility because, if it is not enforceable, it would not be relevant to value.

Defendant first contends that the ordinance is unconstitutional on its face. We conclude that it is not. The mere enactment of an ordinance does not constitute a taking, unless it "denies an owner economically viable use of his land." *Keystone Coal Association v. DeBenedictis*, 480 US 470, 495, 107 S Ct 1232, 94 L Ed 2d 472 (1987); *Joyce v. City of Portland*, 24 Or App 689, 692, 546 P2d 1100 (1976). In *Richard L. Martin, Inc. v. City of Lake Oswego*, 69 Or App 170, 173, 684 P2d 28, *rev den* 298 Or 37 (1984), we held that a sidewalk dedication

ordinance, similar to the Portland ordinance, was not unconstitutional. Defendant has not shown that the ordinance deprives him of an economically viable use of his property. The evidence is that, even without the sidewalk dedication requirement, defendant could not have developed this property because the city's 15-foot setback ordinance would preclude development.

Defendant also argues, relying on *Nollan v. California Coastal Commission*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), that the ordinance constitutes an unconstitutional taking, because it conditions the issuance of building permits on the requirement that property be dedicated for right-of-way purposes. However, analysis of the city's ordinance

under *Nollan* is premature. Under *Nollan*, it is necessary to consider whether the government's requirement would advance a legitimate state interest and whether there is a sufficient relationship between the governmental requirement and the impact of the private development of the property. 483 US at 836-37. That analysis, however, requires consideration of the specific effect of a development. As defendant acknowledges, he has not undertaken or proposed any new development on his property. Therefore, at this time, it is not possible to analyze the relationship between the governmental interests advanced by the ordinance and development of the property, because we do not know what the impact of the development of defendant's property would

be. Defendant's abstract reliance on *Nollan* does not affect either the evidentiary weight of the ordinance or its admissibility, in the absence of any demonstration that it could not be applied constitutionally to any defined present or future facts.

Defendant also argues, relying on *United States v. Virginia E. & P. Co.*, 365 US 624, 635-36, 81 S Ct 784, 5 L Ed 2d 838 (1960), that, even if the ordinance is constitutional, it was inadmissible, because evidence that property has declined in value because of the threat of condemnation cannot be used in establishing the property's value in a condemnation proceeding. As explained by the United States Supreme Court in *Virginia E. & P. Co.*:

> "[I]t would be manifestly unjust to permit a public authority to depreciate property values by a threat [of construction of a government project] and then to take advantage of this depression in the price which it must pay for the property * * *." 365 US at 636.

In this case, it was not the condemnor state's action that reduced the value of the property; it was the *city's* ordinances that had that effect.

Affirmed.

ORDER OF THE SUPREME COURT OF THE STATE OF OREGON DENYING RECONSIDERATION

State ex rel DEPT OF TRANSPORTATION

Respondent/Respondent

v.

WALTER C. LUNDBERG

Appellant/Petitioner

ESTATE OF FRANCES J. LUNDBERG

Personal Representative

ORDER DENYING RECONSIDERATION

SC S37157

CA A50223

The court has considered the Petition for Reconsideration and orders that it be denied.

DATE: April 28, 1992

/S/WALLACE P. CARSON JR.

WALLACE P. CARSON, JR.

CHIEF JUSTICE

APPELLATE JUDGMENT ISSUED BY THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

by and through its

DEPARTMENT OF TRANSPORTATION,

Respondent on Review,

v.

Walter C. LUNDBERG,

Individually and as the Personal Representative of the Estate of Frances J. Lundberg, Deceased,

Petitioner on Review.

CC A8801-00481; CA A50223; SC S37157

STATE OF OREGON,

by and through its

DEPARTMENT OF TRANSPORTATION,

Respondent on Review,

v.

ATLAS CONSTRUCTION COMPANY,

Petitioner on Review.

CC A8711-06919; CA A50779; SC S37205

(Cases Consolidated for Argument and Decision)

In Banc

On review from the Court of Appeals.*

Argued and submitted November 7, 1990.

G. Kenneth Shiroishi, Portland, argued the cause for petitioner on review Walter C. Lundberg.

Paul G. Dodds, Portland, argued the cause for petitioner on review Atlas Construction Company.

Jas. Adams, Assistant Attorney General, Salem, argued the cause for respondent on review.

UNIS, J.

The decisions of the Court of Appeals are affirmed, but on different grounds. The judgments of the circuit courts are affirmed.

* Department of Transportation v. Lundberg: Appeal from judgment of Multnomah County Circuit Court,

Kathleen B. Nachtigal, Judge. 100 Or App 601, 788 P2d 456 (1990).

Department of Transportation v. Atlas Construction Company: Appeal from judgment of Multnomah County Circuit Court, Phillip J. Roth, Judge. 101 Or App 245, 789 P2d 20 (1990)

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party(ies): Respondent on Review

[ ] No costs allowed.

[X] Costs allowed, payable by: Petitioners on Review

MONEY JUDGMENT

Judgment #1

Creditor(s): State of Oregon, Department of Transportation

Debtor(s): Walter C. Lundberg

Costs: $ 145.00

Attorney Fees: $ -0-

TOTAL AMOUNT: $ 145.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

MONEY JUDGMENT

Judgment #2

Creditor(s): State of Oregon, Department of Transportation

Debtor(s): Atlas Construction Co.

Costs: $ 145.00

Attorney Fees: $ -0-

TOTAL AMOUNT: $ 145.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment Effective Date: May 21, 1992

ORDER OF THE SUPREME COURT OF THE STATE OF OREGON RECALLING AND STAYING APPELLATE JUDGMENT

STATE OF OREGON,
by and through its
Department of Transportation,
Plaintiff-Respondent,
Respondent on review,

v.

WALTER C. LUNDBERG,
Individually and as the Personal Representative of the Estate of Frances J. Lundberg, Deceased,
Defendant-Appellant
Petitioner on Review.

Relating to Multnomah County
Circuit Court No. A8801-00481
SC S37157
CA A50223

ORDER RECALLING AND STAYING

APPELLATE JUDGMENT

Appellant has moved for an order recalling the appellate judgment and staying issuance of the appellate judgment pending the filing of a petition for certiorari to the United States Supreme Court. The motion is allowed.

The appellate judgment of May 21, 1992, is recalled. The recall of the appellate judgment shall be noted in the register of the Multnomah County Circuit Court.

DATED this 21st day of July, 2992.

/S/WALLACE P. CARSON JR.

WALLACE P. CARSON, JR.

Chief Justice

Van Hoomissen, J., and Graber, J., not participating.